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In the Supreme Court of the United States

OCTOBER TERM, 1963

HARRY F. BYERGREN & SONS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1432

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v.

NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17-31) is reported at 406 F. 2d 239. The Board's decision and order (Pet. App. 32-50) are reported at 165 NLRB No. 52.

JURISDICTION

The judgment of the court of appeals (Pet. App. 51) was entered on February 25, 1969. The petition for a writ of certiorari was filed on May 24, 1969.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly concluded that the employer's poll of its employees to determine their union support was coercive, in violation of Section 8(a)(1) of the National Labor Relations Act, because no assurances against reprisal had been given the employees.

2. Whether substantial evidence supports the Board's finding that the employer discharged five employees for union activities, in violation of Section 8(a)(3) of the Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 2-3 of the petition.

STATEMENT

In the summer of 1966, the Laborer's Local Union 880, AFL-CIO began an organizing campaign among the Company's laborers. Company President Jerry Berggren was given a copy of the Union's standard contract for the area, which provided for a wage scale higher than the Company's. Berggren arranged for a local minister to poll his employees to determine their union sentiments. (Pet. App. 36.)

The poll was conducted on August 15 at the Company's office. Before the balloting, Berggren spoke to

the approximately 30 employees who participated. He recited the Company's history and said that dissatisfied employees could come to him directly. He added that the wages which airline employees lost during their recent strike would take two to three years to make up, that the Company had never been picketed and had never lost a day's work, and that it was a bad time for a strike. Berggren closed by stating, "The question is, do you men want to be represented by a union or don't you." (Pet. App. 36; Tr. 13, 15-16.)[1] He then left, and the minister polled the employees by secret ballot. Only seven employees voted in favor of union representation. The following day, Berggren filed a petition for a representation election with the Board's regional office (Pet. App. 36-37; Tr. 7-11).

The Union continued its organizing effort despite the results of the poll. During the week of August 22 to 27, Union agents Simmons and Bonilla distributed union literature and authorization cards to nine employees who were repaving the street near St. Mary's Hospital (Pet. App. 37, 42; Tr. 89-92). During this week, four employees signed authorization cards and returned them to Simmons at this site (Pet. App. 43; Tr. 91-92).

On Saturday, August 27, Simmons went to the St. Mary's jobsite about 11:30 a.m.; he waited in the area, mostly around Foreman Richard's pickup truck, for the men to finish work (Pet. App. 42; Tr. 92-93,

[1] "Tr." references are to the transcript of the testimony in the Board hearing.

67-68). Although the men normally worked on Saturday afternoons, on this day five employees left at 12:15 p.m.[2] According to their testimony, which the Trial Examiner credited over the conflicting testimony by Foreman Richards recited in the petition, Richards gave them permission to leave early because all the concrete had been poured for the day and little work remained to be done. (Pet. App. 40-41, 42-43; Tr. 25, 53-54, 66-67, 79-80.) When the five employees returned to work on Monday, they were told that they had quit on Saturday and were no longer working for the Company (Pet. App. 38-40; Tr. 27-29, 81-83, 86-87).

The Board found that the Company's poll of its employees' union sentiments was coercive and therefore violated Section 8(a)(1) of the Act (Pet. App. 44). The Board further found that the Company discriminatorily discharged the five employees because it thought them to be union adherents (Pet. App. 44). The Board ordered the Company to cease and desist from coercively interrogating its employees concerning their union sentiments, to offer reinstatement with backpay to the five employees, and to post appropriate notices (Pet. App. 33-34, 46-48). The court of appeals sustained the Board's findings and enforced its order (Pet. App. 17-29).[3]

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[2] A sixth employee also left early, but did not appear at the Company's office or the Board hearing; no evidence pertaining to him was offered, and the complaint regarding him was dismissed.

[3] One Board member and one judge each dissented on the polling issue (Pet. App. 30-31).

ARGUMENT

1. As petitioner points out (Pet. 9), the test of whether employer polling or interrogation of employees concerning their union sentiments violates Section 8(a)(1) of the Act is "whether, under all circumstances, the polling or interrogation reasonably tends to restrain or interfere with employees in the exercise of rights guaranteed to them by the Act." In *Struksnes Construction Co.*, 165 NLRB No. 102 (1967), 65 LRRM 1385, the Board enunciated certain guidelines for use in determining this basic question, drawing on its experience and that of the courts of appeals with the problem.[4] A principal factor is whether the employer has given the employees assurance against reprisal. Neither petitioner nor the dissenting judge appears to challenge the appropriateness of this requirement. The sole difference between them, on the one hand, and the court majority, on the other, is whether such assurance was adequately given here.

The court majority found that, since the employees were not expressly told that no reprisals would be taken against them if they expressed a preference for

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[4] In that case, the Board concluded (65 LRRM at 1386):

> Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

the union, the Board justifiably concluded that the poll was coercive notwithstanding that other safeguards were observed; petitioner and the dissenting judge contend that assurances against reprisal were inherent "in the totality of the circumstances" (Pet. App. 30), and that this was sufficient to render the poll non-coercive. Such an issue, turning as it does on the facts of this particular case, does not warrant review by this Court. Moreover, for the reasons it gave (Pet. App. 25-26), the court below was warranted in concluding that, absent an express assurance against reprisal, the otherwise coercive effect of the employer poll here was not sufficiently dissipated.

National Labor Relations Board v. *Protein Blenders*, 215 F. 2d 749 (C.A. 8) is distinguishable, for there the employees were expressly told by the employer that, if they expressed a preference for a union, "there would be no consequence of any nature to any of them for so doing" (at 751). And the other two cases petitioner relies on (Pet. 11) involve not systematic polling, but only isolated instances of informal questioning.

2. The second question petitioner presents (Pet. 11-16) raises only an evidentiary issue, which is not appropriate for review by this Court. In any event, petitioner relies on a version of the facts not credited by the Trial Examiner. The evidence summarized in the court's opinion (Pet. App. 27-29) demonstrates the ample evidentiary support for the Board's finding that the five employees were discharged because of their union activity. Four of the eight laborers at the St. Mary's Hospital site had signed union authoriza-

tion cards when a union organizer met there with six of them on Saturday, August 27. These were the six who, the following Monday, were said to have "quit" at that time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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